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No. 82-241

In the Supreme Court of the United States

OCTOBER TERM, 1982

MOBAY CHEMICAL CORPORATION

and

PENNWALT CORPORATION,
Petitioners,

vs.

ANNE M. GORSUCH, Administrator, United States Environmental Protection Agency,
Respondent.

PETITIONERS' BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF AUTHORITIES CITED

Cases

Chevron Chemical Company v. Costle, 641 F.2d 104 (3d Cir. 1981), *cert. denied*, 452 U.S. 961 (1981) 5, 6

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) 7

Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974) 6

Statutes

Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§136-136y ("FIFRA"):

Section 3(c)(1)(D) 5, 6
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123 *Cong. Rec.* H11854 (daily ed. Oct. 31, 1977) (Statement of Rep. Wampler) 4

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This case squarely presents the novel and substantial issues of what constitutional protections are to be afforded private intellectual property consisting of trade secrets.

I

The Government does not dispute petitioners' initial and principal position that their *right to exclude* others from the use and enjoyment of the private trade secret research at issue, which right was heretofore fully recognized under established principles of *both* State and Federal law, is an interest in property protected by the Fifth Amendment. Nor does the Government question that this right to exclude is the paramount interest in and to the intellectual property at issue, without which petitioners'

ownership is foreclosed, and their research, *qua their property*, is destroyed. Finally, the Government does not dispute that the challenged provisions of FIFRA have, by their mere enactment, deprived petitioners of and taken their right to exclude, thereby irrevocably committing to the public domain the trade secret research which was petitioners' property.

Curiously, the thrust of the Government's Brief is to recharacterize the critical issues presented. The Government says that

> "State law does not . . . govern this case. Rather, the question presented is whether any state law by itself creates, or may create, a property right that precludes Congress from lawfully directing a Federal agency to make internal use of information submitted to it or to disclose to the public health and safety data relevant to the potential risks and hazards posed by pesticides."

(Res. Br. 12). Petitioners agree that State law does not govern this case. Rather, the Constitution does. As stated in their Petition, petitioners do not "seek to superimpose State law upon any otherwise lawful activity of the Federal Government." (Pet. 11). State law is, of course, important because the issue whether one possesses an interest in property within the meaning of and protections afforded by the Fifth Amendment is often dependent upon the recognition of and protection of that interest under State law. Here, however, the protections against unauthorized use and unauthorized disclosure of petitioners' trade secret research—petitioners' *right to exclude*—have long been recognized by *both* State and Federal law. Moreover, the Government conceded below that *much* of petitioners' research contains or relates to trade secrets or confidential commercial information. The question thus

presented is whether Congress can, within the power conferred upon it by the Constitution and subject to the restrictions of the Fifth Amendment upon that power, simply take petitioners' intellectual property for the use and enjoyment of petitioners' competitors and of the public.

Further, it is clear that the indisputed effects of FIFRA's interdependent provisions deprive petitioners of and take their intellectual property. There is no question presented to the Court regarding any internal EPA use of petitioners' research other than *to support* the applications of petitioners' competitors for registration of their products. The limited but critical restriction of FIFRA's prior provisions upon EPA's use of petitioners' research *in support of* their competitors' applications was carefully articulated by Congress in the legislative history of these provisions.

> "There is nothing to prevent use of such data in evaluating other test data or denying another application."

S. Rep. No. 838 (Part II), 92d Cong., 2d Sess. 12 (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News, 3993, 4034.

> "[A]ll data either voluntarily submitted hereunder or required to be submitted by the Administrator may be used by the Administrator in making determinations of the adequacy of the test data submitted in connection with other applications."

Id. at 72. Thus, EPA has never been precluded from using petitioners' research in evaluating the research of their competitors. EPA was simply prohibited from granting to petitioners' competitors registrations based on petitioners' research.

In the 1978 amendments to FIFRA at issue Congress was not, therefore, concerned with any restriction upon EPA which inhibited it from evaluating or considering data in connection with its pesticide registration activities. Rather, as candidly commented by Congressman Wampler, the ranking minority member of the House Committee on Agriculture:

> "I do have some reservations about these amendments—not as to congressional purpose or intent—but as to the interpretations the people of the Environmental Protection Agency will place on them. After all, the real reason for this action by the House is to break an administrative logjam created by rules, regulations, and interpretations imposed on the industry, the States, and the farmers by EPA that makes the current laws as intended by Congress inoperative.
>
> Therefore, Mr. Chairman, I remain pessimistic about this legislation."

123 *Cong. Rec.* H11854 (daily ed. Oct. 31, 1977). The question presented regarding EPA's use of data is thus a narrow one—may EPA absolve petitioners' competitors of any responsibility to develop or submit the research required to support their products and, instead, grant them their registrations on the basis of petitioners' trade secret research.

Section 3(c)(1)(D) of FIFRA now provides that except for certain so-called "exclusive use" research submitted by petitioners with respect to wholly new active ingredients registered for the first time after September, 1978, EPA may, without petitioners' permission, use virtually all of petitioners' trade secret research *to support* any registration sought by their competitors. Further, Section

3(c)(2)(A) of FIFRA provides that within 30 days after petitioners' research is so used by EPA and a competitor's product is registered, EPA *shall* make petitioners' research public. The mandate of Section 3(c)(2)(A) likewise compels EPA to disclose petitioners' research, including their "exclusive use" research, whenever they obtain a registration. Finally, the protection afforded by Section 10(b), which heretofore prohibited EPA's disclosure of petitioners' trade secret research, is now expressly subjected to the limitations of Section 10(d)(1). Congress did not thereby preempt the trade secret protections of petitioners' research recognized under State and Federal law. Rather, it simply compelled the disclosure of petitioners' research even though it is trade secret. The only research of petitioners now protected from public disclosure is that limited information set forth in Section 10(d)(1)(A)-(C), and then only under certain circumstances. Thus, the Government has conceded that almost all of petitioners' research is now made available to the public under the provisions of Section 10 of FIFRA.[1]

The limited issues regarding Section 3(c)(1)(D) presented to the Third Circuit in *Chevron Chemical Company v. Costle*, 641 F.2d 104 (3d Cir. 1981), *cert. denied*, 452 U.S. 961 (1981) were confused, in part, by that court's failure to discern that Section 757 of the *Restatement, Torts* (1939) specifically protects against unauthorized use of trade secrets by persons to whom they have been sub-

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1. Section 3(c)(1)(D) gives *the use* of petitioners' research to their competitors. Sections 3(c)(2)(A) and 10 *cause* its disclosure to them. Petitioners are perplexed by the Government's statement that their "data remain in the agency's files, and never are given or shown to the subsequent registrant" (Res. Brief 13 n.10), unless this statement is simply reflective of the Government's practice of making copies of the data in its files for purposes of disclosure and then only disclosing the copies.

mitted in confidence.[2] 641 F.2d at 115. *But see Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 475 (1974). However, the *Chevron* court did find "that the material was submitted to the federal government with some expectation of confidentiality." 641 F.2d at 115. Nevertheless, petitioners' subsequent appeals to the same court were summarily rejected on the basis of *Chevron*, and the rationale of *Chevron* was simply expanded to deny consideration of the issues presented by petitioners.

The Third Circuit's *post hoc* recharacterization of petitioners' submission of their research as a voluntary relinquishment of their rights in exchange for a commercially valuable license finds no support in the record. The Government does not dispute that petitioners submitted their research in the confidence that it would not be used for the benefit of their competitors or publicly disclosed, nor has the Government ever suggested that petitioners have waived, voluntarily or otherwise, any of their rights in their research. Indeed, EPA's present regulations respecting the disclosure of the research submitted by petitioners under FIFRA specifically provide that none of it "is voluntarily submitted information." 40 C.F.R. §2.307(g) (1981). Petitioners have not, therefore, ever made any *exchange* of their research in connection with the registration of their products, nor have they ever made the one articulated by the Third Circuit which simply assumes that petitioners not only surrendered their

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2. Most of the limited issues presented to the Third Circuit in *Chevron* were abandoned in the subsequent Petition for writ of certiorari in that case which was filed in this Court. As stated by the Government in its Brief in Opposition to that Petition, "we note that a number of cases involving broader challenges to Section 3(c)(1)(D) of the 1978 amendments, challenges to Section 10, or challenges to both sections are pending in the lower courts. (Res. Br. 15 n.7). The first two actions thereafter listed by the Government were those of petitioners.

research to secure a license for their products but also for their competitors' products as well.

Finally, the Government disarmingly posits a remedy under the Tucker Act, 28 U.S.C. §1491, for any taking of petitioners' property caused by FIFRA. This was a principal defense of the Government below to the declaratory and injunctive relief sought by petitioners. *But see Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 71 n.15 (1978). However, unless this Court issues its writ of certiorari prayed by petitioners, the Third Circuit's judgment will irrevocably deny petitioners recourse to any Tucker Act remedy even should the Court be of the view that such a remedy would otherwise be available and adequate for the taking effected by FIFRA. This then is but a further significant reason why the Petition should be granted.

II

Respondent maintains that the questions presented respecting the unreviewable compulsory arbitration mandated by FIFRA are not yet ripe for review, a contention raised by it before both of the courts below and rejected. The record establishes that such arbitration has been sought and is imminent. Further, the cases cited by respondent do not directly address or predetermine any of the questions presented.

CONCLUSION

The Government has sought to characterize petitioners' research solely as "health and safety data." Petitioners do not deny that the public health and safety is now and has always been an important objective in their product development programs. But the public health and safety is also an important objective of those who devote their

resources to the development of new and better products in every field of complicated endeavor. That the research at issue here has resulted from petitioners' development of new and safer pesticides, rather than from the development of new and safer pharmaceuticals, commercial aircraft or energy sources, does not diminish its commercial significance or competitive value. FIFRA's barriers to entry in the pesticide industry have not, as suggested by the Government, been lowered by Congress in the challenged amendments. (Res. Br. 13 n.10). Rather Congress has simply taken petitioners' complex and invaluable research meeting FIFRA's high standards and given it to their competitors and the public. For the reasons set forth above and in the Petition, this case presents questions of critical constitutional import which fully warrant plenary consideration and resolution by the Court.

Respectfully submitted,

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